In the Supreme Court of the United States.

OCTOBER TERM, 1897.

GEORGE POUNDS, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 298.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The plaintiff in error was convicted on the sixth count of the indictment, which reads as follows (Rec., p. 3):

> The grand jurors aforesaid, upon their oaths aforesaid, do further present that at the time and place and within the jurisdiction aforesaid the said George Pounds unlawfully did conceal and aid in the concealment of distilled spirits on which the tax had not been paid, which said spirits had been removed

> to a place other than the distillery warehouse provided by law, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

The indictment charges the date of the offense on the 1st day of July, A. D. 1895, in the southern division of the northern district of Alabama, and within the jurisdiction of said court, in the county of Cleburne.

This count in the indictment is drawn under section 3296 of the Revised Statutes, which reads as follows:

> Whenever any person removes, or aids or abets in the removal of any distilled spirits on which the tax has not been paid, to a place other than the distillery warehouse provided by law, or conceals, or aids in the concealment of any spirits so removed, or removes, or aids or abets in the removal of any distilled spirits from any distillery warehouse or other warehouse for distilled spirits authorized by law, in any manner other than is provided by law, or conceals, or aids in the concealment of any spirits so removed, he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than two hundred nor more than five thousand dollars, and imprisoned not less than three months nor more than three years.

The judgment of the court was that the plaintiff in error, "George Pounds, be imprisoned in the common jail of Jefferson County for the period of six months, to be computed and commence from November 30th, 1896, and that he pay a fine of one hundred dollars and the costs of this prosecution, for which execution may issue." (Rec., p. 9.)

After the verdict, and before the judgment, the plaintiff in error filed his motion in arrest of judgment as follows (Rec., pp. 7, 8):

> Now comes the defendant after the rendition of the verdict of the jury finding him guilty as charged in the 6th count of the indictment and before judgment and sentence, and moves the court to arrest the judgment in this case, upon the ground that the sixth count of the indictment is too vague and uncertain to authorize a judgment and sentence against the defendant.

Afterwards an amended motion in arrest of judgment was filed, as follows (Rec., p. 8):

> By leave of the court first had and obtained the defendant amends his motion in arrest of judgment by adding the following grounds:
>
> First. The said sixth count of the indictment fails to show that there was a warehouse provided by law to which the spirits alleged to have been concealed should have been removed.
>
> Second. That the jury separated before the verdict of the jury was returned into court.

POINTS AND ARGUMENT.

It is not deemed necessary to detain the court for a consideration of the grounds set forth in the amended motion. There is nothing in the record to show that the jury separated before the verdict was returned into court, but the record does show that a sealed verdict was returned by the jury by agreement of counsel for both parties in open court and in the presence of the defendant.

As to the first ground in the amended motion, the charge is that the spirits concealed were spirits which had been

removed to a place other than the distillery warehouse provided by law. It was not necessary to either allege or prove under this charge that there was a distillery warehouse to which the spirits ought to have been removed. The gist of this offense is the removal of untax-paid spirits in a manner otherwise than is required by the provisions of the internal-revenue laws. These laws require distilled spirits from the stills to be run into what are called cistern rooms, which are under the custody of the storekeeper and gauger assigned to the distillery, and which are secured by a lock to which he has the key. The spirits, when produced and run into the cistern room, are required to be taken, under the supervision of the storekeeper and gauger, and deposited in the distillery warehouse provided by law, and there gauged and marked by him and reported upon a prescribed form to the collector. Upon proper withdrawal papers sent up by the distiller, stamps are issued, to be affixed to the packages to denote the payment of the stamp tax on the spirits, and after the affixing of such stamps the spirits can be removed from the warehouse by the distiller. Now, it is to prevent a violation of this law that it was made an indictable offense to remove spirits upon which the tax had not been paid to a place other than a distillery warehouse provided by law, and it was also denounced as a crime to conceal, or to aid in the concealment of, spirits on which the tax had not been paid, which said spirits had been removed to a place other than a distillery warehouse provided by law.

The removal of distilled spirits on which the tax has not been paid to any place other than a distillery ware-

house provided by law is unlawful, and to conceal or aid in the concealment of distilled spirits so removed is also unlawful. So the omission to set forth in the indictment that there was a warehouse provided by law, to which the spirits alleged to have been concealed should have been removed, does not constitute a defect. The law requires that there should be a warehouse, and no distillery can be legally operated without a warehouse. When a distillery is shown to be in existence, the law presumes that it is complete, as required by the statutes.

This leaves the case, then, to be considered upon the question raised in the motion in arrest of judgment, viz, "that the sixth count of the indictment is too vague and uncertain to authorize a judgment and sentence against the defendant."

The attorney for the plaintiff in error, in setting forth his grounds in arrest of judgment, did not enlighten the court as to wherein the vagueness and uncertainty existed. The only possible objection which could be urged to the count upon which the plaintiff in error was convicted is the fact that it charges that he did unlawfully conceal and aid in the concealment of distilled spirits on which the tax had not been paid, which said spirits had been removed to a place other than the distillery warehouse provided by law.

Now it is true that it would have been better form to have charged the concealment in one count, and aiding in the concealment in another, but the joinder of the two charges in one count is not repugnant, and does not come within the rule that a count in an indictment which charges two distinct, independent offenses is bad.

Although these two offenses appear by the use of the disjunctive in the statute, they are in fact but one offense, and may be stated conjunctively in one count.

Where a person is charged with doing a thing which constitutes an offense, and causing it to be done, it is sufficient to charge both in one count, it being held that it is the same thing in law to cause a thing to be done as to do it.

Bishop's New Crim. Proc., Vol. 1, sec. 434, p. 268; *United States* v. *Nunnemacher*, 7 Bissell, 129; see also *United States* v. *Blaisdell*, 9 Int. Rev. Rec., 82.

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